No. 78-1156

In the Supreme Court of the United States

OCTOBER TERM, 1978

JEFFREY R. MACDONALD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals upon remand from this Court (Pet. App. 42-43) is reported at 585 F. 2d 1211. The initial opinion of the court of appeals (Pet. App. 7-41) is reported at 531 F. 2d 196. The opinion of the district court (Pet. App. 1-6) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 1978, and a petition for rehearing was denied on November 24, 1978 (Pet. App. 44). On December 15, 1978, the Chief Justice granted an extension of time to and including January 23, 1979, within which to file a petition for a writ of certiorari, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an indictment charging petitioner with the murder of his family is barred on grounds of double jeopardy because of a prior military investigation conducted pursuant to Article 32 of the Uniform Code of Military Justice.

STATEMENT

In *United States* v. *MacDonald,* 435 U.S. 850 (1978), this Court ruled that petitioner could not, before trial, appeal an order denying his motion to dismiss an indictment because of an alleged violation of the right to a speedy trial. The case was remanded for further proceedings, including consideration of petitioner's pre-trial appeal of the order refusing to dismiss his indictment on double jeopardy grounds. See *Abney* v. *United States,* 431 U.S. 651 (1977). On October 27, 1978, after granting petitioner's motion for rebriefing on the issue of double jeopardy, the court of appeals rejected petitioner's double jeopardy claim and remanded the case to the district court for trial (Pet. App. 42-43).

The facts are described in this Court's opinion (435 U.S. at 851-852) and in the initial opinion of the court of appeals (Pet. App. 9-14). Briefly, petitioner, then a Captain in the Army Medical Corps assigned to the "Green Berets" at Fort Bragg, North Carolina, telephoned the military police in the early morning of February 17, 1970, seeking assistance. The police rushed to petitioner's quarters and found that petitioner's wife and two young daughters had been brutally murdered. Petitioner told the officers that the family had been attacked by four unknown "hippies." The Army's Criminal Investigation Detachment, the Federal Bureau of Investigation, and local police began an immediate investigation of the crime, the results of which led them to question petitioner's story concerning the assailants. On April 6, 1970, petitioner was informed that he was a suspect and was relieved of his medical duties.

On May 1, 1970, pursuant to Article 30 of the Uniform Code of Military Justice (U.C.M.J.), 10 U.S.C. 830, petitioner's commanding officer formally charged him with the murders. As required by Article 32 of the U.C.M.J., 10 U.S.C. 832, an investigating officer, Colonel Warren V. Rock, was appointed to investigate the matter and to recommend to the General Court-Martial Convening Authority (the post commander) whether the murder charges should be referred to a general court-martial for trial.

After completing his investigation, Colonel Rock recommended that the charges against petitioner be dismissed but that the civilian authorities investigate a named female suspect. On October 23, 1970, the commanding general of petitioner's unit accepted the recommendation and dismissed the charges, citing insufficient evidence to refer the case to a general court-martial. In December 1970, the Army granted petitioner an honorable discharge for reasons of hardship.

Following petitioner's discharge from the military, the CID continued the investigation of the crimes at the request of the Department of Justice. This investigation led to the production of a 13-volume report in June 1972 and supplemental reports in November 1972 and August 1973. These reports contained substantial scientific and other evidence casting serious doubts upon the veracity of petitioner's version of the events at his residence at the time of the slayings. On January 24, 1975, a grand jury of the United States District Court for the Eastern District of North Carolina returned an indictment charging petitioner with three counts of first-degree murder, in violation of 18 U.S.C. 1111.

Petitioner challenged the indictment on a number of grounds, including double jeopardy, pre-indictment delay, and denial of a speedy trial. The district court denied petitioner's motions (Pet. App. 1-6). Petitioner took an

immediate appeal, and the court of appeals reversed on the basis of denial of a speedy trial (*id.* at 7-41). This Court then reversed the court of appeals' judgment, holding that the court below lacked jurisdiction to consider the appeal of the speedy trial claim prior to trial.[1]

ARGUMENT

Petitioner's claim that the district court erred in holding that his prosecution for murder was not barred by the Double Jeopardy Clause was properly rejected by the court of appeals.[2] Moreover, as petitioner concedes (Pet. 15 n.14), the court's decision "appears to be the first one ruling on this issue," which depends largely upon an interpretation of military law. In these circumstances, this case does not warrant further review.

1. Petitioner's double jeopardy argument is grounded on the assertion that the Army's preliminary investigation, conducted pursuant to Article 32 of the U.C.M.J., was a proceeding that placed him in jeopardy. This position is incorrect as a matter of military law. Before a charge may be referred to a general court-martial, it must first be subjected to a thorough and impartial Article 32 investigation. See *Manual for Courts-Martial, United States* para. 34 (Rev. ed. 1969). "An Article 32 investigation is a probable cause type investigation designed to eliminate unfounded charges and gather

[1]The government also argued in this Court that the court of appeals erred in considering the period between October 1970 and January 1975, during which time petitioner was not under any criminal charges, in calculating the length of delay for Sixth Amendment speedy trial purposes. See Brief for the United States, No. 75-1892, at 47-70. The Court had no occasion to reach this issue in view of its resolution of the jurisdictional question.

[2]The Fourth Circuit's ruling is not a "departure" (Pet. 15) from its earlier opinion, which was concerned solely with petitioner's speedy trial claim (see Pet. App. 29).

evidence should a charge be brought to trial." *Calley* v. *Callaway,* 519 F. 2d 184, 215 n.54 (5th Cir. 1975) (en banc), cert. denied, 425 U.S. 911 (1976). It "operates as a discovery proceeding for the accused and stands as a bulwark against baseless charges"; although "[i]t is judicial in nature," it is only "a preliminary proceeding, not a trial on the merits." *United States* v. *Samuels,* 27 C.M.R. 280, 286 (1959). See also *Humphrey* v. *Smith,* 336 U.S. 695 (1949) (discussing the proceeding mandated by the 70th Article of War, 10 U.S.C. (1940 ed.) 1542, supplanted in 1950 by Article 32). Its functional counterparts in federal criminal procedure are the grand jury proceeding (see *MacDonald* v. *Hodson,* 42 C.M.R. 184 (1970)) and the preliminary examination (Fed. R. Crim. P. 5.1). Never has an Article 32 proceeding been found to be more than a preliminary hearing or pretrial discovery proceeding.[3] It is not one of the methods of trying an offense committed by a serviceman. See *Middendorf* v. *Henry,* 425 U.S. 25, 31-32 (1976).

Hence, petitioner could not have been convicted at the Article 32 proceeding. As the Court noted in *Serfass* v. *United States,* 420 U.S. 377, 391-392 (1975), "[w]ithout risk of a determination of guilt, jeopardy does not attach." Since "an accused must suffer jeopardy before he can suffer double jeopardy" (*id.* at 393), petitioner's indictment does not violate the Double Jeopardy Clause. See *Crist* v. *Bretz,* 437 U.S. 28, 32-33 (1978).

[3]The cases relied upon by petitioner are inapposite. In *United States* v. *Cunningham,* 30 C.M.R. 402 (1961), the court determined that an accuser may not serve as the investigating officer conducting the Article 32 proceeding. In discussing the functions of the Article 32 proceeding, the court labeled it an "important pretrial right." *Id.* at 404. *United States* v. *Tomaszewski,* 24 C.M.R. 76 (1957), and *United States* v. *Nichols,* 23 C.M.R. 343 (1957), hold that in an Article 32 proceeding an accused is entitled to either civilian or military counsel or the equivalent. The court termed the proceeding a pretrial hearing (23 C.M.R. at 348) and a discovery proceeding (24 C.M.R. at 78). None of these decisions refers to an Article 32 proceeding as a trial.

2. Based on the investigating officer's report, the commanding general dismissed the charges against petitioner without any reference of the charges for trial by a court-martial. Soon thereafter, petitioner sought and received an honorable discharge from the Army, thus halting any further military prosecution. *United States ex rel. Toth* v. *Quarles,* 350 U.S. 11 (1955). Consistent with Colonel Rock's explicit recommendation (Pet. App. 11), however, the Department of Justice continued to pursue the case, and the murder indictment involved here was returned in January 1975. Since petitioner has never been tried before a military or civilian court on the charges in this indictment, collateral estoppel, which "bars relitigation between the same parties on issues actually determined at a previous trial" (*Ashe* v. *Swenson,* 397 U.S. 436, 442 (1970)), does not preclude his prosecution any more than the failure of one grand jury to return an indictment in a case presented to it collaterally estops a second grand jury from issuing an indictment or the government from prosecuting such an indictment.[4]

In *United States ex rel. Rutz* v. *Levy,* 268 U.S. 390 (1925), for example, defendants had been brought before a United States Commissioner in Illinois to determine whether they should be removed to Ohio to stand trial. After a hearing, the commissioner ordered their discharge for want of probable cause. Subsequently, similar

[4]Petitioner also argues (Pet. 23-25) that his prosecution is contrary to an agreement between the Justice Department and the Department of Defense. In the first place, the agreement is only an intragovernmental allocation of prosecutorial functions, not a constitutionally mandated requirement, and it therefore confers no enforceable rights on criminal defendants. See *Sullivan* v. *United States,* 348 U.S. 170 (1954). More important, the agreement could not have been meant to continue to apply to a situation, such as this case, in which only one of the departments has the authority to act. The Defense Department lost jurisdiction over petitioner after his discharge from the Army.

proceedings were instituted before a federal district judge in Illinois, who ordered the marshal to take defendants into custody. Defendants then sought writs of habeas corpus, claiming that their discharge by the commissioner for lack of probable cause, following an evidentiary hearing, was an adjudication upon that question and a bar to a second proceeding. This Court disagreed (*id.* at 393-394):

> [T]he discharge of an accused person upon a preliminary examination for want of probable cause constitutes no bar to a subsequent preliminary examination before another magistrate. Such an examination is not a trial in any sense and does not operate to put the defendant in jeopardy. * * * The utmost that can be said is that the decision of a commissioner favorable to the accused is persuasive and may be sufficient to justify like action upon a second application; but it is not controlling.

Here, too, the investigating officer's conclusion that the charges against petitioner at the Article 32 proceeding were untrue, while a factor to be considered in determining whether to pursue the case, did not preclude a grand jury four years later, following an "extensive and wide ranging" (435 U.S. at 851) reinvestigation, from finding probable cause to believe that petitioner had killed his wife and daughters and should therefore be indicted for the murders. See also *Morse* v. *United States*, 267 U.S. 80, 85 (1925); *Collins* v. *Loisel,* 259 U.S. 309, 315 (1922).

The criminal cases relied upon by petitioner do not support his collateral estoppel argument. In *United States* v. *Oppenheimer,* 242 U.S. 85 (1916), the defendant had been indicted for conspiracy to conceal assets during bankruptcy. The district court dismissed the indictment on the erroneous ground that the statute of limitations

barred prosecution, but the government did not appeal. Instead, it obtained another indictment, alleging the same offense. This Court upheld the dismissal of the second indictment on the basis of the doctrine of *res judicata*, not collateral estoppel, concluding that "[a] plea of the statute of limitations is a plea to the merits, and however the issue was raised in the former case, after judgment upon it, it could not be reopened in a later prosecution" (*id.* at 87-88; citation omitted). Similarly, in *Ashe* v. *Swenson, supra*, the defendant, who had been tried and acquitted of the robbery of one of six men at a poker game, was charged with the robbery of another of the poker players during the same incident. The Court reversed the defendant's conviction, holding that the judgment of acquittal at the first trial necessarily embodied a finding by the first jury that there was at least a reasonable doubt that defendant was one of the robbers and that the State could not relitigate that issue (397 U.S. at 446-447). In this case, as the court of appeals properly concluded, "because no final judgment of a tribunal having jurisdiction to try [petitioner] has determined an issue of ultimate fact, the prosecution pending in the district court is not barred by * * * collateral estoppel" (Pet. App. 43).[5] See *Montana* v. *United States*, No. 77-1134 (Feb. 22, 1979), slip op. 4-5.

[5]The other cases relied upon by petitioner, all of which involve civil litigation, are equally inapposite. *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394 (1966), involved an administrative agency that had acted in a judicial capacity in resolving a disputed issue of fact. The Court held that the agency's ruling in such circumstances was entitled to *res judicata* effect. *Id.* at 421-422. Both *Parklane Hosiery Co.* v. *Shore*, No. 77-1305 (Jan. 9 1979), and *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313 (1971), deal with the unrelated issue of whether mutuality of estoppel must be present before a party may make either offensive or defensive use of collateral estoppel based on issues resolved in an earlier trial. Finally, there is no conflict with the Second Circuit's decision in *Lummus Co.* v. *Commonwealth Oil Refining Co.*, 297 F. 2d 80 (1961), cert. denied, 398 U.S. 986 (1962). There, the district court in Puerto Rico had enjoined a contract arbitration and a New York court action to compel arbitration on the ground that a dispute existed as to the validity or existence of the contract agreement. The United States Court of Appeals for the First Circuit reversed, however, finding that the party challenging the arbitration (Commonwealth) had failed to present a substantial issue of fraud in the making of the contract. The United States District Court for the Southern District of New York then ordered a trial on the arbitrability of the same contract. The Second Circuit granted mandamus to prohibit the district court from holding the trial, concluding that the issue of the contract's validity had already been resolved by the First Circuit's decision. Hence, unlike the present case, the decisions cited by petitioner each involved instances where a court or agency had resolved a disputed issue of fact while acting in an adjudicatory rather than an investigatory capacity.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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